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Mr. Cawaja
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Jan 30/84

ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND
RELATED MATTERS.

Hearing held
8th floor
180 Dundas Street West
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange	Commissioner
P.S.A. Lamek, Q.C.	Counsel
E.A. Cronk	Associate Counsel
Thomas Millar	Administrator

Transcript of evidence
for

January 30, 1984

VOLUME 1

(in-camera)

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"IN-CAMERA"

1 ROYAL COMMISSION OF INQUIRY INTO CERTAIN
2 DEATHS AT THE HOSPITAL FOR SICK CHILDREN
3 AND RELATED MATTERS.

4 Hearing held on the 8th Floor,
5 180 Dundas Street West, Toronto,
6 Ontario, on Monday, the 30th day
7 of January, 1984.

8 THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner
9 THOMAS MILLAR - Administrator
10 MURRAY R. ELLIOT - Registrar

11 APPEARANCES:

12 P.S.A. LAMEK, Q.C.) Commission Counsel
13 E. CRONK)
14 T.C. MARSHALL, Q.C.) Counsel for the Attorney
15 D. HUNT) General and Solicitor General
16 L. CECCHETTO) of Ontario (Crown Attorneys
17 and Coroner's Office)
18 I.J. ROLAND) Counsel for The Hospital for
19 M. THOMSON) Sick Children
20 R. BATTY)
21 B. PERCIVAL, Q.C.) Counsel for The Metropolitan
22 D. YOUNG) Toronto Police
23 K. CHOWN Counsel for numerous Doctors
24 at The Hospital for Sick
25 Children
B. SYMES Counsel for the Registered
Nurses' Association of Ontario
and 35 Registered Nurses at
The Hospital for Sick Children
H. SOLOMON Counsel for The Ontario
Registered Nursing Assistants
J. SOPINKA, Q.C.) Counsel for Susan Nelles -
D. BROWN) Nurse

(Cont'd)...



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/BM/ak --- Upon commencing at 10:05 a.m.

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THE COMMISSIONER: Now, Mr. Sopinka, you caused us to gather here, do you want to tell us why?

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MR. SOPINKA: Well, I have three points to be raised; one with respect to the admissibility of certain evidence in the testimony of the witness Costello; the second point relates to the police report, production of the police report and the third point is with respect to having evidence that relates to Phase II adduced from the witnesses that are now appearing, that is, the nurses.

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THE COMMISSIONER: I wonder if we could, do you have a particular desire as to the order you are requesting to discuss them?

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MR. SOPINKA: It doesn't matter to me.

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THE COMMISSIONER: I think the second and third we can dispose of quite readily.

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Mr. Lamek was going to make an announcement at the beginning of the formal, the opening hearing but he may as well make it now, I think it is about the police report.

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MR. LAMEK: And I may want to make



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it again in a public session, Mr. Commissioner.

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THE COMMISSIONER: All right.

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MR. LAMEK: Just going back on the brief history of the thing. At the meeting between Messrs. Sopinka, I believe Strathy, Percival, myself and you, sir, it was agreed with respect to the police report that it could not be released containing materials which went beyond the terms of reference as you had defined them and, in particular, that meant as containing information going to the ongoing investigation of the police after May of 1982 except as such information investigation relating to cause of death. It was therefore agreed that I could be trusted to adduce an expurgated version of the police report eliminating the offending material. That I have been able to do with the co-operation of Mr. Percival, and I'm grateful to him for that, and it has now been finalized and indeed bound. The question that remains is to the scope of the circulation of the expurgated version of the report.

At the meeting which I have described it was originally contemplated that I believe it would go to those who might be most directly affected by it, that is to say, Mr. Sopinka and Mr. Strathy with respect to their clients. In later



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3 discussion with Mr. Percival it seems to me there
4 is probably no objection to its having wider
5 circulation.

6 What I propose to do today is
7 deliver copies of the report as expurgated to
8 Mr. Sopinka and to Mr. Strathy and ask them to let
9 me know by tomorrow morning whether they have any
10 objection to its receiving wider circulation to
11 all counsel and, if so, perhaps we could have
12 submissions on that before you tomorrow.

13 THE COMMISSIONER: Yes. Also, if
14 they have any objection to the deletion too.

15 MR. LAMEK: Yes but of course they
16 won't know what the particular deletions were. But
17 I have described the scope of them, they are matters
18 which go to the investigation after May of 1982 and
19 which do not otherwise bear on the terms of
20 reference.

21 THE COMMISSIONER: Yes. Well, you
22 don't have to answer that question now but you can
23 think about it and if you have any objection to that,
24 you can say so tomorrow.

25 MR. LAMEK: One thing I should
26 make clear, Mr. Commissioner, before I end.

27 Mr. Percival has made it clear to me and I don't
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2 think there should be any doubt in anyone's mind
3 that he has asserted a claim of privilege in respect
4 of the entire contents of the police report, I make
5 no comment on that, to the extent that he is agreeing
6 with his client's consent to release to counsel,
7 any counsel, portions of the report. He insists he is
8 not to be taken as waiving any privilege he may
9 assert in respect of the balance. Is that fair?

10 MR. PERCIVAL: That is fair.

11 THE COMMISSIONER: But that doesn't
12 mean that it is acknowledged ---

13 MR. PERCIVAL: I understand that,
14 Mr. Commissioner.

15 MR. LAMEK: But merely the assertion
16 of it.

17 MR. SOPINKA: I think that that
18 is a positive first step. Mr. Lamek said two things
19 which aren't the same thing. I mean, the deletions
20 that I probably will be most concerned about are
21 the ones after May of '82. He said it has been
22 agreed that anything will be deleted that doesn't
23 bear on the cause of death and then he said anything
24 was deleted that didn't relate to the terms of
25 reference. Those are quite two different things.

THE COMMISSIONER: He is deleting



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anything that bears on the investigation after the
release of your client unless what is there bears
upon the cause of death, in which case it is not to be
deleted.

6 MR. SOPINKA: Well, I think that
7 is too restrictive because there may be something
8 that relates to the terms of reference after May of
9 1982 as to the nature of the investigation that
10 ought to have been conducted in the first place
11 which would be relevant to Phase II. For instance,
12 let's suppose that there is an interview, just as
13 a pure example, there is an interview with a witness
14 who has never been interviewed until June of '82
15 and the witness says if you had just spoken to me
16 I could have given you this information and that
17 would have completely changed your view of the thing
and it is something that in your opinion they ought
to have done.

18 THE COMMISSIONER: Well surely it
19 will have something to do with the cause of death,
20 would it not?

21 MR. SOPINKA: Well, it may or may
22 not.

23 THE COMMISSIONER: Well, it would
24 have to have something to do with the cause of death
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even if it is going to affect the final dissemination
of the cause of death then it should be produced
and that I take it it will be. So that obviously
if that circumstance that you gave - you might be
able to dream up another one but you are going to
have some trouble because anything that is vitally
important to the investigation will obviously have
something to do with the cause of death.

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10 MR. SOPINKA: Well, so long as we
have that understanding.

11 THE COMMISSIONER: Well, I don't
12 think there is any question about that. I haven't
13 seen the deletions but...

14 MR. LAMEK: No. I think that not
15 to be a difficulty.

16 MR. SOPINKA: And I'm sure I can
17 discuss it with Mr. Lamek and draw him out on the
18 nature of the deletions so as to satisfy me because
I have difficulty.

19 THE COMMISSIONER: Well, we are
20 giving the whole report to you.

21 MR. SOPINKA: Well, I have
22 difficulties making submissions as to ---

23 THE COMMISSIONER: I know you do,
24 I know you do.

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MR. SOPINKA: Without having seen it.

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THE COMMISSIONER: But this is the
way we tried to resolve the problem.

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MR. SOPINKA: Well, I think that is
a reasonable way of proceeding.

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THE COMMISSIONER: Now, the next
thing, I did say something about Phase II in Phase I.
We are getting very close to Phase II now, I don't
want to have this witness - if this witness had
something to do with Phase II I don't want to have
to bring her back if she has just one or two questions
going on. Do you have any concern about that?

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MR. SOPINKA: No. My point is
this that I can understand that there shouldn't be
if possible a duplication by Commission Counsel. As
far as I am concerned, if the Commission Counsel
wishes to lead the evidence that might otherwise be
lead in Phase II, that's fine, but I reserve the
right to have the witness called back for cross-
examination. I'm not prepared for Phase II. I
always thought that Phase II, first of all, I would
have the police report some time in advance and,
secondly ---

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THE COMMISSIONER: You have it today,
so, you have it some time in advance, yes.



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MR. SOPINKA: My view of it was,

and I remember arguing this before you and I don't think you disagreed that Phase II was an examination into what the police did and ordinarily I would have thought that I would have had a chance to ask the police how they proceeded before those against whom the investigation was directly testifying. So, I may be in some difficulty because I don't know what the police evidence is and that's why I ask for the unrestricted right to ---

THE COMMISSIONER: Well, I don't

think there is any real problem, I wouldn't have thought, so far as your client and Mr. Strathy's client is concerned. I don't think there is a real problem. It is not intended that they will be questioned particularly on Phase II, is it, in this Phase. They can give evidence when they are invited to at the end of Phase II, just as they have been invited to do at the end of Phase I. But the other members of the Trayner team, certainly the nurses who weren't on the Trayner team, I don't want to have to bring them back, that's all, unless we have to.

I really think that the main things are, are they not, the meeting of March 23rd on which ---



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2 MS. CRONK: And later that week.

3 THE COMMISSIONER: And later that
4 week, that really is essentially all we are going to
5 ask.

6 MS. CRONK: That's right.

7 MR. PERCIVAL: I gather that what
8 Mr. Sopinka is really concerned about is something
9 that was disclosed at a later time by Mary Costello
10 for the first time to the police and copies of which
have been given to counsel.

11 THE COMMISSIONER: Yes. Well, we
12 will deal with that in a minute.

13 MR. PERCIVAL: But I agree with
14 you, Mr. Commissioner, you know, why have them
15 come back again on a second time because we are
right into it.

16 THE COMMISSIONER: Yes, I think so.
17 Yes, Mr. Hunt.

18 MR. HUNT: In one sense we are
19 right into it, Mr. Commissioner, insofar as the
20 police dealing with this witness and the other
21 witnesses are concerned and that properly is Phase II
22 but there is another aspect that I wonder if you are
23 intending to go so far as opening this up and that
is in terms of the dealings the witnesses may have

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2 had with Crown Attorneys in the course of preparation
3 for hearing their evidence at the preliminary hearing.
4 It may be that even though Commission Counsel seemed
5 to limit their examination to matters they feel for
6 the police others would want to expand it into
7 areas where the Crown is involved and that may
8 change the character of the examination that we
9 are dealing with now if it is going that far.

10 THE COMMISSIONER: I certainly
11 hadn't thought that we were going into that. Has
12 anybody got any contrary thought?

13 MR. PERCIVAL: I wasn't certainly
14 intending to get into that aspect.

15 MR. SOPINKA: No, but it raises
16 the question. Supposing I have some questions that
17 I would otherwise have with Ms. Costello with her
18 dealings with the Crown Attorneys. I am obviously
19 not going to put them now and if it comes germane
20 then I don't want it to be taken that somehow there
21 is an onus on me to have them back.

22 THE COMMISSIONER: No, but you will
23 have to - if for instance no one else wants to
24 have Nurse Costello back except you, you will have
25 to justify bringing her back and the way you will
justify it is, say, it just occurred to me today it



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would be a good idea to ask her about this, you
will scream about the injustice and how your client
was being muzzled.

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MR. SOPINKA: Well, how intractable
will you be, I mean, I haven't seen any results
so far.

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THE COMMISSIONER: Well, it will
depend. I don't think I will go all the way to
the Divisional Court.

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No, the one thing though I do want
to avoid though is having to call people back for
really just one or two simple little questions and
in all probability I'm sure we will be able to
agree what the answer is and save the witness coming
back. However, I know we are going to have problems
of that nature and I would expect you to address it
yourself just before the deadline for the papers comes
out you will have some statement that would be
good. But then Mr. Percival will stand up five minutes
later and we will have the next edition.

MR. SOPINKA: Well, I mean, I just
want to put the most difficult scenario, on June
30th I say I want Ms. Costello back and you have
made plans to go to the cottage, I mean, I don't
expect any difficulty.



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MS. CRONK: We will invite you to
the cottage.

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THE COMMISSIONER: All right.

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MR. SOPINKA: Isn't that great
when you are in-camera.

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MR. HUNT: Could I take it from
that then that we are not going to have questioning
8 of these witnesses on dealings that they had with
9 the Crown Attorneys in this prior preliminary hearing
10 because if that is an open area obviously we would
11 want to have people involved here to give us some
12 instructions.

13

THE COMMISSIONER: Have you given
14 any thought to Phase II to know whether you have
15 any such ---

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MS. CRONK: It certainly wasn't
17 given any thought to get into that area at this
stage.

18

THE COMMISSIONER: Well, there you
19 are. So, I don't think it is going to be. Yes?

20

MS. SYMES: So that I understand,
21 we will be permitted to cross-examine our own
22 witness with respect to any statements that she made
23 to the police before Susan Nelles' arrest and
thereafter, up to and including May of '82?

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THE COMMISSIONER: Well, I think you will be able to cross-examine her about any statements she made at the same time, I don't know why. If she had made a statement yesterday that is entirely contrary to what she said today, you can cross-examine her, these are the ordinary rules of cross-examination, there are no problems. We are just not dealing with things after the release, developments after the release but if something she said has some bearing on the cause of death, as long as she said yesterday, certainly, you can cross-examine her about that, no problem. You understand what I'm saying?

14

MS. SYMES: Well, clearly what is Phase II aspects, that is the police investigations starting on Sunday, March 22nd and it is opening this period, that is, those nursing witnesses that are called starting with this witness, they can be questioned then with respect to what they said to the police.

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THE COMMISSIONER: Certainly.

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MS. SYMES: And not specifically related to the cause of death but with respect to the police investigation as well.

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THE COMMISSIONER: Well, are you



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concerned about the police investigation?

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MS. SYMES: Some of my clients are,
4 yes, most definitely.

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THE COMMISSIONER: Well, that's
6 something - but I don't want to get into that unless
7 it is absolutely essential. What sort of questions
8 do you have in mind that you might be asking some
9 of your clients about the police investigation in
this phase?

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MS. SYMES: Well, Mr. Commissioner,
if your ruling is that they will not be recalled,
that is the only time ---

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THE COMMISSIONER: Well, I can't
make a ruling that they will not be called. What
I am saying is, I hope not to have to recall them
and if you in Phase II want to have one of the
witnesses back, of course, if you still have standing
in Phase II, which I presume you will have, or we
are not too sure about funding, but if you still
have standing at that time and want to call a
witness for some reason of course you can call them.
If you have to recall a witness, you have to get
my permission and I may not give it if it seems to
me that it is not necessary. If the thing goes to
Mr. Sopinka, I don't think that either of you will



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want to call somebody unless it is absolutely vital,
in which case you will concede, but if it is, if it
is something that either you forgot to ask or
something like that.

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MR. SOPINKA: Well, that raises a
good point because I think Ms. Symes' point is well
taken. For instance, I'm sure I will want to know
what information she gave the police ---

THE COMMISSIONER: What did she say
to the police?

MR. SOPINKA: Yes.

THE COMMISSIONER: Well, we know
that.

MS. SYMES: No you don't I don't
think.

THE COMMISSIONER: Well, I thought
that it was in the report.

MS. SYMES: No.

THE COMMISSIONER: No?

MS. SYMES: There is a very
important meeting that occurred on Monday, March
23rd, as to the commencement of the police investiga-
tion.

THE COMMISSIONER: And that is
going to be gone into?



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MS. CRONK: That's right.

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THE COMMISSIONER: This is what I
don't want to happen. I don't want to have to come
back and therefore if there is something that you
feel has to be asked, even though it is in Phase II
and not in Phase I, go ahead and ask it, but think
about it, think about it.

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MS. SYMES: Well, Ms. Costello

would prefer to give evidence, she's not objecting
to that, just so I understand those kinds of
questions will be asked, she is most delighted to
give her evidence.

THE COMMISSIONER: Well, that will

make her happy. Now, has anybody else got any
comments on Phase II and Phase I before we go to
Mr. Sopinka's evidence?

MR. TOBIAS: I only have a question,

Mr. Commissioner. Is it your intention to break
after the conclusion of evidence in Phase I for
some period of time so that counsel can prepare
argument and hear argument in Phase II?

THE COMMISSIONER: That's right.

MR. TOBIAS: Before commencing
with the taking of evidence of Phase II?

THE COMMISSIONER: That's my



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intention. That really is so that some counsel
can be excused from - I don't want anything of
the cause of death coming up in Phase II and if
it does come up in Phase II, I will have some -
unless it is somebody who wants to tell us he saw
the smoking gun or something of that nature, but I
want to get all of this Phase I stuff over with
so that the argument can intelligently be given
and we won't have any of it in Phase II.

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Phase II concentrates on the police
investigation and prosecution.

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MR. PERCIVAL: Mr. Commissioner,
perhaps, I have already asked Commission Counsel
on this, could it be of some assistance to other
counsel if we knew what the likely order of
witnesses that we are taking about in the next
few weeks and dealing primarily with the nurses?

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THE COMMISSIONER: I think we
have had that. We are having all of the other
nurses on the Trayner team, starting with
Ms. Brownless, Ms. Christie.

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MR. PERCIVAL: We know Costello
is on now and who is the next one?

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THE COMMISSIONER: Radojewski. Am
I right?

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MS. CRONK: No, Bertha Bell.

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MR. LAMEK: Bell and then Radojewski and Johnstone and there may be a couple of additional witnesses after those, Mr. Commissioner, I'm not absolutely sure yet, but my friends and everyone else will know as soon as I do and then, as you say, we will go, starting with Brownless and working through to Mrs. Trayner.

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Could I say one other thing about scheduling, please. I think you have now been persuaded we should not sit the week of March 12th which I believe to be the school break. It would be I hope that we may be very close to the end of the Commission evidence by the time we rise for that week off. I have no idea yet, or very little, whether other counsel propose to call evidence following the end of the evidence which I propose to tender. I would be grateful if I could know as soon as possible what the plans of other counsel are or the intentions of other Counsel. If by the March break I could be told and there will be very little more evidence to come from me after that it would be helpful in scheduling things because then I propose that having heard all of the evidence, our own and that adduced by anyone else, I think I would suggest to you that we take a couple of weeks off and then come back for argument, if it does go to scheduling and the start up of Phase II.

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2 If I can ask to be told not later than the time we
3 adjourn for the March break what the intentions of
4 other counsel are to the calling of evidence, I
5 would be grateful.

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7 MR. SOPINKA: Mr. Commissioner, I
8 seem to be in charge of this in-camera hearing but
9 everybody seems to welcome it as an opportunity to
10 unburden themselves. I hope you will tell the press
11 it was a very fruitful meeting and not just for my
12 objections.

13

14 THE COMMISSIONER: I think we will
15 give Mr. Sopinka full credit.

16

MR. LAMEK: Absolutely.

17

18 THE COMMISSIONER: However, we
19 haven't really got around to the point yet, have we?

20

21 MR. TOBIAS: Before we do that, Mr.
22 Commissioner, I don't want to muddy the waters again,
23 because you may not need to hear from us at all
24 depending on what Mr. Sopinka says concerning his
25 objections to the wider circulation of the
expurgated version of the police statement.

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29 It would certainly be helpful, and
30 I think I speak for most counsel, if indeed having
31 heard all of the evidence in Phase 1 we argued the
32 point, and that was it, that was the end of it.

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There is the problem of what happens if something
inadvertently comes up in Phase 2 which goes to
cause of death, which is another matter. But to
ensure that everyone is satisfied that they have
heard all of the evidence relating to cause of death
and have had a full opportunity to cross-examine on
it, it would be most helpful if the police report
would be given that wider distribution. If it isn't,
then I see that as a possible problem in terms of
making argument at the completion of Phase 1.

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THE COMMISSIONER: I think the

police report argument, if there is to be any
argument, should be done with everybody around
because that is of some considerable importance as
to whether it is or is not, and we will know by
tomorrow at 10 o'clock, Mr. Sopinka or Mr. Brown, or
Mr. Strathy or Ms. Forster, or somebody will tell
us whether they have any objection to two things;
the wide distribution and to the exclusion that
has been conducted by Mr. Lamek and
Mr. Percival. That is the first point, the
admissibility of evidence, does anybody else want
to say anything?

MR. SHINEHOFT: Yes. I have just

one hypothetical question. What happens if all the



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2 evidence as far as cause of death goes in on Phase 1,
3 and certain counsel are excluded and then in Phase 2
4 although it be unlikely, there is additional evidence
5 that is tendered as far as the cause of death?

6 THE COMMISSIONER: We have a problem.

7 MR. SHINEHOFT: What does that do as
8 far as the people who are not there?

9 THE COMMISSIONER: I have got a
10 problem, I tell you, I have got one. I shall blame
11 Mr. Lamek for having arranged this as Phase 1 and
12 Phase 2, I will find a scapegoat somehow. We will
13 have to solve that problem, and probably under
14 those circumstances I would have to send notices out
15 to all the people affected and say that this evidence
16 has been given, here it is, the witness is available
17 for cross-examination, come on back and amend your
18 argument accordingly. That is what I will probably
19 have to do but I can also reach the conclusion that
20 it is not that important, it doesn't matter, it is
21 not going to make any particular difference and I
22 won't do it. It is something I will have to deal
23 with at the time. What I am trying to do now is
24 ensure that it doesn't happen, okay?

25 Now, what about the evidence you
want to have excluded?



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MR. SOPINKA: Well, at the risk of this being characterized as more yelling and screaming I have a serious objection to some evidence that is proposed to be tendered.

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The substance of the evidence appears in a note made by the police on Tuesday, June 17th, and I am sure you are aware of it. In my submission --

9

10 THE COMMISSIONER: I have Thursday, June 17th, is that it, is that the one?

11

MR. SOPINKA: Thursday, yes.

12

13 THE COMMISSIONER: Is it the one that starts "7:20 - 7:28"?

14

MR. LAMEK: 7:20 a.m.

15

16 MR. SOPINKA: The substance of the statement that I submit is highly prejudicial and has virtually no probative value --

17

THE COMMISSIONER: Which one is it?

18

MR. SOPINKA: It is on page 2:

19

20 21 22 23 24 25
"I felt that Liz-that there is a murder in Liz' house and I couldn't look at Phyllis Trayner or Susan Nelles."

And then:

"Liz said of the two of them it had



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2 "to be Susan Nelles because she was
3 more intelligent."

Now, based on the information I have,
I mean that is a pure speculation based on the fact
that earlier Miss Costello had attended a meeting
with the police, and the police were talking about
homicide. I mean, she has nothing to back it up, so
it is pure speculation, and I would submit would be
of no value, no probative value whatever but it will
be of great prejudicial effect if it is purported --

11 THE COMMISSIONER: Who was it that
12 said this?

13 MR. PERCIVAL: This is Mary Costello
talking to John Murray.

14 MS. CRONK: Just to help my friend;
15 there is two parts to it, the first as Mr. Sopinka
16 points out is the statement directly attributed to
17 Mary Costello. The second appears to be a statement
18 Miss Costello made attributing it to Elizabeth
19 Radojewski. The comment as to relative intelligence
20 of the two women is one apparently made by
Elizabeth Radojewski.

THE COMMISSIONER: I think - I don't
think there is going to be much question when we come
to dealing with statements of nurses, we should not

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2 have hearsay unless the hearsay evidence can other-
3 wise be admissible. Obviously what Radojewski may
4 have said to Costello I don't think should be put in.
5 I know we have been allowing it, and we are getting -
6 it is most important it does not appear that we are
7 getting into a witchhunt of any kind. I think the
8 usual protection of the criminal law should be
9 extended to all of the members of the Trayner team,
10 and if anything was said by anybody about them we
11 have to have the person who said it there for that
12 purpose. I don't think there should be any questions
13 put as to what did Mrs. Radojewski say, except from
14 her. The first one though was apparently something Miss
15 Costello said. Do you intend to adduce that,
16 Ms. Cronk?

17

18 MS. CRONK: Only the part that deals
19 with what Ms. Costello said as opposed to what she
20 has attributed to Liz Radojewski.

21

22 THE COMMISSIONER: What is that part
23 precisely she said?

24

25 MR. SOPINKA: "I felt there was a
murder in Liz' house."

26

27 Now you have to bear in mind that
28 this statement was not made to any police officer
29 until June 17th, 1982, and she is talking about how
30 she felt at the meeting of March 23rd, 1981. I

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2 submit if you are applying the criminal standard
3 that evidence as to how she felt based on nothing
4 would not be admissible, even if it was admissible
5 on some tenuous basis, it should be excluded on the
6 basis it is so highly prejudicial.

6

7 THE COMMISSIONER: Is there some
8 basis, and don't answer me and tell me what the basis
9 is, but is there some basis for her feeling, or not?

10 MS. CRONK: In my submission there
11 is, Mr. Commissioner.

12 THE COMMISSIONER: There is?

13 MS. SYMES: I would like to make a
14 submission after Mr. Sopinka has finished.

15 THE COMMISSIONER: Yes, okay. I
16 think we had better hear the rest of it.

17 MR. SOPINKA: Ms. Symes has spoken to
18 Miss Costello more than we have. Based on what I have
19 spoken to her about I submit you would be satisfied
20 that there is nothing to back it up other than the
21 fact that Susan Nelles was there, and Trayner was the
22 leader of the team, and the fact that Susan Nelles
23 happened to administer the proper dosage to Baby
24 Pacsai. Perhaps I should finish my submissions.

25

THE COMMISSIONER: Yes.



B.8

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2 MR. SOPINKA: Apart from that ground,
3 that if you are applying a somewhat stricter test,
4 and I submit you should at this stage, apart from
5 that in my submission it should be excluded on the
6 basis that it is not strictly speaking relevant to
any subject matter in the Terms of Reference.

7

8 THE COMMISSIONER: Well it could be,
it could be, that is something we may have to go into.

9

10 MR. SOPINKA: I understand the
Divisional Court Judgment is coming down today, I
11 was told that you were aware of that.

12

13 THE COMMISSIONER: Well, when I say
I was aware of it, all I am aware of is that one of
14 the judges was surprised that it didn't come down on
Friday, that sort of gives me an indication.

15

16 MR. SOPINKA: I happened to be
walking up the street and I ran into a person of
17 undeniable reliability, it wasn't hearsay or anything
18 of that nature, if you get my drift. He suspected
19 having heard that I was blocking evidence here that
this matter would be of some interest to me and I
20 understand it is coming down today but I may be
21 proven wrong yet, and I will no longer rely on that
22 source of information.

23

24 THE COMMISSIONER: It may be the same

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2 source I got it from, I don't know. In any event
3 the rumour was that it was expected to be down on
4 Friday and it didn't come down but it may come out
5 today, that is the rumour. Often it has been my
6 experience these judgments particularly when it is
7 a two or three person judgment are sometimes not
as easy to get out as you think.

8

9 MS. CRONK: Sir, may I just
10 interject, I just want to be clear as to what Mr.
Sopinka is objecting to, which portions of the
statement.

11

12 THE COMMISSIONER: He is objecting
13 to --

14

MS. CRONK: I'm sorry, if I could --

15

THE COMMISSIONER: Yes.

16

17 MS. CRONK: There are three parts
18 to the statement which in my view are at least in
19 issue. I am not suggesting for the moment that any
20 are relevant or irrelevant. The first it seems to
21 me, and I don't know if Mr. Sopinka has any objec-
22 tions, the first introduction to the statement
23 where the police officers indicate that they ex-
plained the investigation and then in Staff. Sgt.
24 Gordon's notes there appears to be an indication
25 that Miss Costello acknowledged that someone was



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2 deliberately killing babies. In Sgt. Murray's
3 notes, I am not at all sure that is the same
4 language, it appears to simply say: "Knowledge
5 someone killing babies". It seems to me that is
the first statement that is potentially in issue.

The second one Mr. Sopinka has
7 drawn your attention to, and that is the comment
8 expressly attributed to Miss Costello concerning
9 what she perceived to be the situation on March
10 23rd in Liz Radjojewski's house, and her comment
11 that she had difficulty looking at Phyllis Trayner
12 and Susan Nelles, that is the second.

17 THE COMMISSIONER: The Liz Radojewski
18 one I don't think there is that problem with it,
19 it just won't come from Costello, it would have to
20 come from Radojewski.

21 MR. SOPINKA: We will face the same
problem with Radojewski.

22 THE COMMISSIONER: We may well face it,
23 if it comes at all it has to come from Radojewski.

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B.11 2 MS. CRONK: I raised it, sir, because
3 it is my understanding you will be hearing sub-
4 missions from other counsel on that.

5

THE COMMISSIONER: All right.

6 MR. SOPINKA: I don't object, I don't
7 think I can object to the first statement because
8 that does not identify, does not use the term
9 "murder", says "deliberately killing". If it is
10 based on something it might have some relevance to
11 the cause of death. But I submit with respect to
12 the evidence, first of all the terms "murder" is
13 used which obviously draws a legal conclusion. Then
14 the statement by Radojewski that one of them is
15 smarter, I mean that is absolute garbage to allow
16 that kind of evidence in, no matter who gives it.

17

18 Now, I submit that apart from the
19 fact that it doesn't meet the criminal standard, or
20 anywhere near it, it is not relevant, and of course
21 here we have to get into some speculation as to what
22 the Divisional Court is going to do. Whatever they
23 do I submit that you clearly reserve the right to
24 exclude certain evidence, where in your opinion its
25 probative value is so slight that its prejudicial
effect was such that you wouldn't include it if you
were trying a case, even trying --



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B12 2 THE COMMISSIONER: I have very little
3 trouhle, because what we would do under those
4 circumstances, you would exclude the jury and I
5 would probably hear it. What is it you are claiming
6 is the basis for this statement, and if there was
7 no basis for it at all I would simply say you can't.

7

8

9

MR. SOPINKA: Absolutely. I would
be quite content for you to hear this lady in
chambers.

10

11

12

THE COMMISSIONER: I don't want to do
too much of this. I thought we could sort of find
out now -- is this the only thing that you are
objecting to?

13

14

MR. SOPINKA: That is correct.

15

16

THE COMMISSIONER: What is the basis,
or do you want to tell me, Ms. Symes, what was the
basis upon which you said she made the statement?

17

18

19

MS. SYMES: Well, first of all,
Mr. Commissioner, this clearly was made after your
inquiry, the scope of your inquiry.

20

21

THE COMMISSIONER: I'm sorry it
was made, this is a statement, wasn't this a statement
made on the 23rd of March?

22

23

MS. SYMES: No, sir. It is made
June 17, 1982.

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B13 2 THE COMMISSIONER: Oh yes, this
3 statement was, but she is referring to something she
4 said back --

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MS. CRONK: That she felt.

6

THE COMMISSIONER: Oh yes, that
she felt.

7

MS. SYMES: Mr. Commissioner, with
respect there is two parts to your investigation
because the cause of death, the second part of the
investigation is irrelevant and --

11

THE COMMISSIONER: It has nothing
to do with the police investigation, I agree with
that.

13

MS. SYMES: And now with respect to
cause of death I think it has no relevance with
respect to cause of death and is highly prejudicial
for the following reason. The conversation relates
to Miss Costello's feelings at the meeting at Liz
Radojewski's on March 23rd.

19

THE COMMISSIONER: Before you go
any farther, it is not just the statement. What is
concerning me is is there something behind it, is
there some reason why she felt that, is it an
acceptable reason, and if it is I think we should
heard it, if it isn't I don't think we should but,

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B142 subject to what Ms. Cronk has to say. I was asking
3 at the time, my question was, what caused her to feel
4 that way.

5 MS. SYMES: I was just going to say
6 on March 23rd in the afternoon, just hours before
7 this meeting at Radojewski's, she met with Warr,
8 the police officer, who introduced himself as from
9 Homicide and informed her that he was looking at
10 four babies' deaths, Cook, Miller, Pacsai and
11 Estrella. He told them that a pattern was becoming
12 obvious. He asked her which nurses were on duty
13 for all four deaths. He told her that all four
14 babies had high digoxin levels, and he said that
15 someone thinks these babies were murdered with
16 digoxin. He told them that the two Head Nurses
17 were not to tell anyone about this meeting, but were
18 to continue the pretense of a Coroner's Inquest on
19 Pacsai.

20 It was with this knowledge and only
21 this knowledge that she attended the meeting on
22 March 23rd. In other words she had nothing other
23 than what this police officer had told her several
24 hours before this meeting. In other words, she, sir,
25 had no first-hand knowledge whatsoever because she
was in Vancouver the prior week returning late on



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B15 2 Sunday afternoon.

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is that with respect to the issue of cause of death,
the feelings that she had relate solely to what the
police officer told her with respect to that. So
that would have limited any probative value with
respect to the cause of death, and I agree they
were highly prejudicial to Trayner and Nelles.

9

MS. CRONK: May I speak to that

10 issue, sir?

11 THE COMMISSIONER: Yes, you may.

12 I wonder if there is anyone else
13 who wants to keep it out, we may as well have it
in order.

14

MS. CRONK: I agree.

15 THE COMMISSIONER: Is there anyone
16 else who wants to speak to keep it out?

17

MR. ROLAND: Mr. Commissioner, based
18 on the facts, I don't know those facts that Ms.
19 Symes has put before you --

20

THE COMMISSIONER: Why not wait
until we hear, Ms. Cronk may have other facts, so
21 if you are still making up your mind we will hear
22 from you at the end. Is there anybody else who
23 wants to keep it out?

24

25



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2 B16 MS. FORSTER: I certainly do, sir,
3 for the reasons already stated by Ms. Symes and Mr.
4 Sopinka.

5 THE COMMISSIONER: Anyone else?

6 All right now, Ms. Cronk, let us
7 hear from you and if you are prepared to tell us
8 what the reasons are.

9 MS. CRONK: Sir, may I start with
10 the issue of the basis as I understand it on which
11 Miss Costello formed this belief.

12 In part I agree with the facts
13 suggested to you by Ms. Symes, but in several
14 respects they do not reflect my understanding. First,
15 as a result of my meetings with Miss Costello it was
16 not my understanding, although the question by my
17 recollection was specifically put to her, that Sgt.
18 Warr at any time during that meeting indicating it
19 was thought that someone was deliberately killing
20 these babies. I thought Ms. Symes had attributed
21 that statement to him directly, perhaps I misunder-
22 stood my discussions with Miss Costello.

23 THE COMMISSIONER: To Sgt. Warr?

24 MS. CRONK: Yes, to Sgt. Warr, that
25 had not been my understanding. It is absolutely
correct Miss Costello was absent from the Hospital



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2 on vacation for the period March 14 until March,
3 the morning of March 23rd when she returned to duty.
4 The evidence has in part already established, and
5 will establish, however, that she was there variously
6 not on vacation for the entire other period with
7 which we are concerned. She was most certainly
8 there during the period of time when Janice -- I don't
9 mean physically personally on duty at the time of
10 death, but either the next morning or the day before,
11 when Janice Estrella died, for example, and many
12 of the deaths that occurred on Ward 4B.

13

14 It is my understanding, and there
15 are two parts of course to this comment; the first
16 is the statement that she felt there was a murderer
17 in the house. I had not had the understanding that
18 that might have been prompted by direct statement
19 by Sgt. Warr as suggested by Ms. Symes. I acknow-
20 ledge the fact that she had a meeting with Sgt.
21 Warr that day and he identified himself as an
22 officer from Homicide. She may tell us it influenced
23 her thinking in that regard, I don't dispute that.

24

25 The second part of her comment
however was that she couldn't look at either Phyllis
Trayner or Susan Nelles. After the arrest of Susan
Nelles she went to Elizabeth Radojewski and



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2 apologized for her behaviour concerning those two
3 women. Now, that matter was not dealt with by
4 Ms. Symes, and quite frankly that is the part of
5 the comment which we as Commission Counsel are
6 most interested. It seems to me, sir --

7

THE COMMISSIONER: You interviewed
her, why could she not do it?

8

MS. CRONK: All right. Miss
9 Costello, it is my understanding that Miss Costello
10 will say when she began to think that there had
11 been foul play or deliberate malfeasance with
12 respect to these children that she reached the con-
13 clusion that it could only be a Registered Nurse who had
14 been involved. She was aware by that time and had been
15 for several months that most of these deaths were
16 associated with the same nursing team, that is
17 Phyllis Trayner's, and she had some -- she looked
18 to Phyllis Trayner and Susan Nelles in distinction
19 and therefore to the other members of that team.
20 Obviously I am interested specifically in why it
21 was not probed at length with her, perhaps for
22 obvious reasons at our pre-evidence meeting. She
23 did however say that she felt it had to be a
24 Registered Nurse and not a Registered Nursing
25 Assistant by virtue at least of the fact the



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2 Registered Nursing Assistants were not authorized
3 to administer medications.

4 When it was pointed out to her that
5 there was at least one other Registered Nurse who
6 was a member of that team, namely Sui Scott, Miss
7 Costello may be able to offer an explanation on the
8 witness stand as to why she was not taken into
consideration.

9 There is no doubt, sir, that the
10 basis at least for part of her statement was that
11 she felt if indeed there had been foul play and
12 she refers to the thought that there was at this
13 stage of the game, it necessarily had to include
14 Registered Nurses and specifically she had diffi-
culty with those two individuals.

15 I suggest to you, sir, that the
16 basis for that conclusion with this woman, given
17 her experience and position, was formulated not
18 solely on the basis of any meeting that she had
19 with Sgt. Warr on March 23rd; or at least we
20 should find out, and that evidence should be put
21 before you, but rather on her experience and
22 exposure to that team on these wards and those
deaths.

23 In my submission, perhaps I should
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2 have made this very clear, it was never our
3 intention, sir, to put these statements to Miss
4 Costello directly and seek to have them admitted
5 as an exhibit. Rather it was our intention to
6 canvass with her, to use them only if necessary,
7 sir, as a prior and consistent statement if indeed
8 it should happen that Miss Costello gives evidence
contradictory to what is recorded in these notebooks.

9 THE COMMISSIONER: The point is not
10 a question-if that is something that is contra-
11 dictory, but whether it is evidence that should be
12 led at all.

13 MS. CRONK: I understand that, sir.
14 The difficulty, sir, as I see it is this. You have
15 now had fully put before you the Atlanta Report and
16 you have heard from the authors of the Atlanta
17 Report. The authors have concluded in the report
18 and with extended cross-examination on this issue
19 that two of all the Hospital personnel examined by
them, two nurses had a significant association
20 between their hours of duty and the onset of
21 terminal events for, in the case of Phyllis Trayner,
22 28 deaths and Susan Nelles for 21. The strongest
23 association based on their study therefore was with
24 the two nurses -- and in my submission --

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2 THE COMMISSIONER: I thought the
3 other two were almost the same as Nelles?

4 MS. CRONK: I'm sorry, I am not
5 suggesting there were not others close to Susan
6 Nelles, but for Phyllis Trayner that certainly is
7 not the case, there were 28.

8 I put it to you this way, sir, if
9 Miss Costello independently concluded based on her
10 experience and observations that certain of these
11 children were killed and that the same two people
12 were in some way linked to those deaths to the
13 exclusion of others, that evidence should be before
14 you because it relates directly to the cause of
15 death issue.

16 THE COMMISSIONER: It relates to
17 it. The problem though is if it is pure speculation
18 I would like to keep it out.

19 MS. CRONK: I understand.

20 THE COMMISSIONER: If it is pure
21 speculation, if there is some basis for it, if there
22 is some basis for it you could -- I see no reason
23 why you shouldn't see Miss Costello right now, but
24 this is -- if this is the rule that nothing that
25 someone said to her, other than what was said by a
member of the Trayner team, should be received, nothing



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2 that Radojewski said or anybody else, or the police
3 said, or anything like that should come from her.
4 But her own statements of course she can ordinarily
5 be cross-examined on. The great danger is if her
6 own statements are pure speculation just as anybody
7 around here can say, well, I think so and so was
8 the villain or the villainess in this whole case.
9 That really is not an awful lot of help to us.

10

MS. CRONK: I understand that, sir.

11

12 THE COMMISSIONER: Because I am
13 supposed to make my own conclusion based on the
14 evidence not on the basis of something else. I
15 think you could see Costello and find out what --
16 just exactly what prompted these statements, and if
17 there is nothing behind them except intuition or
18 something of that nature, then I really don't think
19 we should have it. Can you not --

20

MS. CRONK: Mr. Commissioner, I
would not support for a moment the suggestion that
merely speculative evidence be placed before you.

21

THE COMMISSIONER: No.

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MS. CRONK: My submission to you is
this, what I understand the basis upon which she
made these remarks -- may I just conclude, sir?

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THE COMMISSIONER: Yes, all right.

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MS. CRONK: In my submission, Miss Costello, in her position, should be allowed to express an opinion on obviously the cause of death issue if this relates to it, so long as she possesses personal knowledge of the facts upon which that opinion is based. It seems to me, sir, that her evidence, if indeed it is in accordance with what is in these notebooks, will be of assistance to you in two different ways.

The first way is that it may render more probable or less probable the theory that all of these children died from natural causes. Her evidence may assist you in that regard, if she, as an experienced Head Nurse on Ward 4B, independently concluded that some of these children had been killed.

THE COMMISSIONER: That is a perfectly legitimate question, it would seem to me, to ask: Have you any opinion upon how these children met their deaths and what the basis is, and perhaps to the extent that she is an expert, it might be of some assistance. It might conceivably be of some assistance, but when she starts to identify someone as the perpetrator, if that is based only upon her

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C2 2 impression of the person, is that the sort of thing
3 that would be allowed?

4 MS. CRONK: I understood, and I put
5 it no higher than this, sir, I put it no higher
6 than this, I had understood that the reason she made
7 reference to those two women in her interview with
8 the police was because in her mind the only way that
9 those deaths could improperly have been effected was
by the involvement of two Registered Nurses.

10 THE COMMISSIONER: Why? Why does
11 she say it is only those two?

12 MR. SOPINKA: That is an opinion in
13 itself.

14 THE COMMISSIONER: How did those
15 two -- for instance, why not Miss Scott? Why was she not --
16 sorry about this, to bring your poor client in for
17 the first time, but why not? Is she not every bit
18 as capable of --

19 MS. CRONK: Well, sir, that is indeed
20 the area that I wish to explore with her. I suggest
21 to you, sir --

22 THE COMMISSIONER: Well, I know, but
23 what will her answer be?

24 MS. CRONK: All right, Miss Costello's
25 answer to that, when the question was put directly to



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her, if you want the details of it, sir, is that at the meeting on March 23rd at Elizabeth Radojewski's house, she did not think Sui Scott was present. There is other documentary evidence that suggests that the woman was there.

THE COMMISSIONER: Would she have

been unable to look at her too, if that is the case?

MS. CRONK: I have no idea, sir.

THE COMMISSIONER: Well, I really

want to be awfully careful about how this evidence comes out, because the papers are just wild to get something like this, and it really does not advance it too much, at least I do not think it advances it.

But if you have got anything solid,

if she said I thought that -- let us say, for example, I thought that Trayner and Nelles were acting in a very suspicious way when these children were -- well, in what way were they acting in a very suspicious way? Well, they were conferring off in a corner, they were doing all this sort of thing, together, if that sort of thing comes up, that is evidence. But if it is merely a speculative conclusion, I would like to keep it out.

MS. CRONK: I understand that, sir,

and I cannot put it to you more strongly than I have.



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The situation, as I understand it, is simply this, that she concluded, and you will hear from her the reasons that she did, that there was a killer attached to some of these babies. She said that not once but twice in the notes.

THE COMMISSIONER: And she concluded that from what?

MS. CRONK: Well, Ms. Symes may be, with respect to the first comment, entirely right. It may well have been as a result of a meeting that she had with Sgt. Warr when he identified himself as a Homicide officer. She also suggested, however, that at that meeting when there were numerous nurses present in the room that she had difficulty with those two women in particular.

The only basis that she has been able to suggest to me for that difficulty was that she felt that it had to be a Registered Nurse who was involved and of the Registered Nurses who could be involved, it had to be those two. I can put it no higher than that.

It seems to me, sir, that if this woman, based on her exposure to those wards and these teams, felt that that was likely to be the case, that may be of some assistance to you in



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determining whether it is probable or improbable
3 that all of these children died from natural causes.
4 If you are of the view, sir, that it will not be of
5 assistance to you --

6 THE COMMISSIONER: Well no, it might
7 be of assistance; I do not know. If she reached an
8 opinion that someone had poisoned the children and
9 if she reached the opinion that probably it has to
10 be a nurse, it may be acceptable on the basis of
11 her own experience and expertise, I do not know.

12 Do you have any objection to that
13 kind of question: Did you, at that time, have an
14 opinion which you had reached yourself as to the
15 cause of death of the children?

16 MR. SOPINKA: In my submission, she
17 should not be -- this is not a matter of opinion
18 evidence. I mean, if she has a factual basis, for
19 instance, her conclusion that it must have been a
20 Registered Nurse, what is the factual basis, that is
21 proper, you can draw that conclusion. It may be
22 that she can go as far as to say that she thought it
23 must be a -- but if the only basis is that she
24 thought it was a Registered Nurse and then she says,
25 well, it must have been those -- that is valueless.

In my submission, no Crown Attorney



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2 would ever tender opinion evidence of a layman on a
3 question of fact. If she has evidence on which that
4 can be based, that can be adduced and you can draw
5 that conclusion, but it is so prejudicial to have
6 her give the opinion that it can be drawn as easily.
7 In my submission, if there is a dispute as to the
8 basis for this, it should not just be led because
9 there is a dispute and you accept what Commission
10 Counsel says. Let us hear what her basis is. It
11 is not unheard of and it is very common in the most
12 hard-hitting Commissions to have evidence heard in
13 camera in order to satisfy the Commissioner that there
14 is a basis for the evidence going in. If you feel
15 inclined at all to have this opinion adduced because
16 you think there may be some basis for it and you
17 are not content to just have the basis put in, let
18 us have her examined in camera.
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THE COMMISSIONER: It seems to me

it can be done fairly readily. Did you reach a conclusion yourself based upon your own observations as to how these children met their deaths?

Before you answer what the conclusion was, what was the basis for it, on what grounds did you reach that conclusion? Then if the grounds are from what the police told me, the answer to that is we are not interested in having it at all. If the grounds are, well, I was merely speculating, we are not going to have that either.

But if she can give some reason for her conclusion that she has reached before we get the conclusion, then let us have it and let us consider it at that time, and I will simply say, well, it is not strong enough for me, I am not satisfied with that and I do not want to hear it.

Can you do it that way?

MS. CRONK: That presents no difficulty at all, Mr. Commissioner.

THE COMMISSIONER: Well if you can do that, and if I can ask everybody else to do the same thing when they are cross-examining.

Yes?

MS. JACKMAN: Mr. Commissioner, if



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2 she then says no, I did not reach any conclusions
3 myself, does that allow Ms. Cronk to put the state-
4 ment in to contradict her?

5 THE COMMISSIONER: No, no. You mean,
6 she did not reach any conclusion herself.

7 MS. JACKMAN: Well, I mean, she
8 may have been relying on Sgt. Warr's statement, as
9 Ms. Symes has already pointed out to you, in which
10 case she did not reach any conclusion herself. If
11 she answers no, I did not make any conclusions myself,
12 then it seems to me it would open up the question
13 of having the statement admitted to contradict what
14 she said.

15 THE COMMISSIONER: It might, but it
16 probably would not because probably you would say
17 did you make -- you can certainly do that without
18 the statement, did you make a statement? If she
19 is a liar, there is nothing we can do. I mean,
20 she obviously is going to get into trouble if she
21 is going to start lying, but assuming that she tells
22 the truth, then you start off by saying, did you
23 reach a conclusion, did you make a statement there
24 as to your views with respect to the deaths of these
25 children, and if she says no, then there is nothing
 that Ms. Cronk can do but put the statement to her



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2 and say you are supposed to have said this. But
3 assuming she tells the truth, yes, I did, before
4 you tell us what it was you said, how did you reach
5 this conclusion, and if she says it is because of
6 what the police told me earlier, was there any
7 other reason, no, that is the end of it; we do not
8 have to go into it any further.

9 I think as long as it is handled
10 delicately and people thinking about it before they
11 go on, then we will not have this sort of specula-
12 tion come out. Do you follow me? But if she is
13 going to say, no, I never said anything about that meet-
14 ing: about what I thought about the cause of death
15 of these children, we cannot help it. It has got
16 to be put to her because she clearly is not telling
17 the truth or the police are not telling the truth
18 or something, but she does concede, I take it, does
19 she not, that she did make the statement?

20 MS. CRONK: She will not deny, sir,
21 as I understand it, what is in the notebook.

22 MR. SOPINKA: The only problem is
23 that she may not dignify that as a conclusion. I
24 do not think at that stage, if she says no, I did
25 not draw any conclusions, she should then be cross-
examined by prodding into statements --



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2 THE COMMISSIONER: No, but did you
3 not say something to them about this sort of thing,
4 without putting the precise thing that she said.
5 I really am very anxious, and these, I think, are
6 the rules.

7

Yes, Mr. Hunt?

8 MR. HUNT: There is an aspect of
9 this that I do not think we have canvassed here that
10 I think is important, and that is that we have said
11 that beginning with this witness questions relating
12 to the police investigation can be dealt with. Now,
13 as far as I am aware, this is the first time that
14 any person has suggested that as early as March 23rd
15 they had in their own mind, for whatever reason,
16 Phyllis Trayner as a suspect, and it is apparent
17 that that was not conveyed to the police by Nurse
18 Costello until June of 1982.

19 Now, the concerns that you have
20 raised about the basis for her feeling that there
21 was some suspicion about these two people are
22 entirely appropriate when it comes to the factual
23 conclusions she has reached on the question of cause
24 of death. But that is not the real issue when it
25 comes to the question of the police investigation,
 and I do not want to take Mr. Percival's argument



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2 away from him here, but it really is relevant that
3 a nurse, a Head Nurse on that ward, was suspicious
4 of Phyllis Trayner as early as March 23rd and
5 possibly, as well, of Nelles, but I suppose there
6 is more basis for someone being suspicious of her
7 on that day, but suspicious of Phyllis Trayner on
8 March 23rd and did not convey that to the police
9 at that date when she was interviewed.

10 Now, that may have very serious
11 repercussions for the police if that had been
12 conveyed to them on the 23rd of March. It could have
13 turned their investigation in a whole different
14 direction, and that is why, if that is to come out,
15 and in my submission that has to come out, that is
16 certainly something I think the police would be
17 interested and it may well be on behalf of the Crown
18 as well, but if that is part of the police
19 investigation that is being enquired into, then I
20 do not think you can keep that out merely because
21 on another claim it has some prejudicial effect.
22 It has got to be something that we explore, and it
23 is not appropriate to leave it to the second phase
24 when what we are dealing with here is in terms of
25 these witnesses the police investigation. So in my
submission, the other question aside, there is a



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2 very relevant reason why her feelings, whatever
3 they are, it could be she had a dream in the
4 nighttime --

5 THE COMMISSIONER: Well, supposing
6 it does not come out, supposing no evidence comes
7 out that she had any feelings one way or the other
8 as to who the perpetrator was, because the grounds
9 upon which she reached this conclusion were pure
10 speculation, then is it any particular concern of
11 yours as to whether or not she told the police?

12 MR. HUNT: Concern of?

13 THE COMMISSIONER: Well, of yours or
14 of the police; is it?

15 MR. HUNT: Well, I think it has to
16 be a concern of the police.

17 THE COMMISSIONER: No, but merely
18 because they thought somebody must have done it
19 without any evidence, whatever, why would you want
20 to know that?

21 MR. HUNT: Well, at that point the
22 police really only had one group of people to rely
23 on, and that is the people at The Hospital for Sick
24 Children, and they had to look to them for every
25 scrap of assistance that they could in channelling
them into who was responsible for this. Now, this



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2 is March 23rd, the day after Justin Cook dies, and
3 if somebody there is suspicious of someone, in
4 addition to Susan Nelles, and does not tell it to
5 the police, then that fact, I would submit on behalf
6 of the police, is very relevant.

7

THE COMMISSIONER: But if the
suspicion is based upon nothing?

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9 MR. HUNT: It may be nothing. Police
10 go out and investigate people based on what we might
11 think is the most improbable pieces of information
12 and quite often they turn out to be very fruitful
13 investigations. So from their point of view, I do
14 not think it matters what the basis for it is. The
15 police themselves act on a gut reaction to feelings
16 based on their experience, and they appreciate gut
17 reactions of others that are also based on their
experience.

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19 So what we may consider to be some-
thing rather frivolous and not worthy of considera-
20 tion, from the point of view of a professional in-
vestigator it is clearly something that they turn
21 their attention to.

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23 MR. PERCIVAL: Mr. Commissioner,
24 carrying that one step further, certainly it was not
25 until many months later that a meeting in Radojewski's



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2 house on March 23rd came to the knowledge of the
3 police. So I think it is fairly clear that under
4 the circumstances what she felt or did not feel as
5 a result of that meeting was never communicated to
6 the police, and that will become abundantly clear
7 in the second phase.

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9 But I suppose we can skate around
10 it. I thought you, sir, had come to a conclusion,
11 and I think what may be relevant is that, for
12 instance, carrying it one step further without
13 pointing the finger, did you have any opinion, et
14 cetera, and what was it based on, did you ever
15 communicate that to anyone and when was the first
16 time you communicated, and of course, it is going
17 to be presumably on June 17, 1982, again without
18 mentioning what she felt. But that could all be
19 brought out, it seems to me, in order to sort of
20 comply with your present ruling or as I perceive
21 your present ruling to be.

22

23 MR. SOPINKA: This is going to be
24 like treading on eggs because, I mean, she is
25 liable to blurt this evidence out.

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27 MR. PERCIVAL: I am sure Ms. Symes
28 is continuing to talk to her, and I am sure whether
29 she is under cross-examination or examination -- you

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2 know, this is all going to be conveyed to her at
3 some point before she is asked the magic question,
4 Mr. Commissioner. Do not disabuse yourself of that.

5 MR. LABOW: Mr. Commissioner, you
6 may be drawing a very fine line here because this
7 kind of conclusion may be based partly upon her
8 experience and what she observed and partly upon the
9 fact that a Homicide officer questioned her. That
10 may be true with any of these statements, or the
11 fact that they noticed police officers in the Hospital.

12 All of these observations may
13 accumulate into some kind of conclusion, and where
14 are you going to draw the line?

15 THE COMMISSIONER: Well, it is not
16 going to be easy.

17 MR. SOPINKA: We will cross that
18 bridge when we come to it.

19 THE COMMISSIONER: Well, we are
20 going to have to, and we are going to have an awful
21 lot of problems. There is not a solution that is
22 easily done as there is in a criminal trial where
23 you just exclude the jury and the press know that
24 they go to jail if they report. I do not think I
25 have even got any power to tell the press that they
cannot publish anything. I do not think I have got



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2 anything like this at all. I can ask them, but if
3 one does and the other four or five do not, then
4 that hardly seems fair at all.

5 MR. SHINEHOFT: Mr. Commissioner,
6 do you not have the power, as Mr. Sopinka has
7 suggested, to have part of this leading evidence
8 heard in camera?

9 THE COMMISSIONER: Yes, I have, but
10 this is the problem. We are going to be going in
11 and out of this thing and getting everybody excluded
12 from the room, and the press and everybody else, and
13 it is going to be a terrible way to try to run --
14 and how would we know that somebody sitting in the
15 back of the room -- this sort of thing can easily
16 get out.

17 What I would like to have is co-
18 operation from all counsel, knowing what the problem
19 is, the first thing before you ask the question is
20 to ask the basis for the conclusion, the basis for
21 what it is. Now, it may be, Mr. Hunt, that the
22 thing and the way it develops, there will be no way
23 that you can avoid doing it, but I would think at
24 least you could say, did you have a suspicion of
25 anyone else besides Susan Nelles or perhaps you do
not even want to say that, but did you have suspicion,



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2 did you communicate any of your suspicions to the
3 police, how many nurses did you suspect, without
4 mentioning names at all. There may be some way
5 that that can be done.

6 If it cannot be done satisfactorily
7 and you owe your duty to your client, you may well
8 have to say, well, at this point I want to discuss
9 in camera with you some problems. We will just
have to retreat and go through this again.

10 MR. SOPINKA: With respect to Mr.
11 Hunt's point, why not do it this way? I mean if
12 the police testify that they were not told this
13 and if none of us challenge it -- if we challenge
14 it, then we have got to have her back and we have
15 got to ask that the question be put. If we do not
16 challenge it, then you are going to accept the
17 police evidence that they were not told by Miss
Costello about any suspicion about Trayner.

18 MR. HUNT: But the police do not
19 get Miss Costello saying that that is who the person
20 she was suspicious about was. You see, the police
21 are caught in the position where in the public's eye
22 there is some question raised as to whether or not
23 they carried out a proper investigation. The
public is now hearing about all this evidence that

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2 Trayner was there for these deaths and there is no
3 indication, at least to the public, that somebody
4 there was suspicious of Trayner, that particular
5 person, and did not turn them on to it.

6 So, on the one hand, it nicely
7 protects Nelles and Trayner from any prejudicial
8 effects, and I am not suggesting that that is not
9 an appropriate thing to do, but it leaves the police
10 as the ones hanging out there without the full
story being told.

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2 THE COMMISSIONER: Well, that does
3 worry me.

4 MR. SOPINKA: Well, I don't agree
5 with that. I mean, subject to hearing her foundation
6 for this statement, I'm sure the same thing would
7 have occurred to any reasonable person that if two
8 people were there all the time maybe they are
9 suspects but I don't think it comes as a great
10 revelation to the police that somebody thought it
11 might have been one of those two.

12 THE COMMISSIONER: Well, I am
13 concerned about that problem because while we try
14 to protect two people we are doing some others some
15 harm. I don't know how, but I think we will just
16 have to face it when we come to it. We will see
17 what has happened because for all we know
18 Ms. Costello may well have some very good reasons
19 for suspecting both of those people and that will
20 come out and then obviously at that point what she
21 said becomes completely very satisfactory, very
22 vital evidence.

23 MR. SOPINKA: Can we just agree
24 that before we reach that second stage, once we
25 have the foundation for any conclusions we have
an opportunity to make submissions.



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THE COMMISSIONER: Once we have
the foundations then, yes, I will make a ruling as
to whether or not it will go on any further.
Probably in some unclear obvious cases I won't even
ask for argument but if it is a clear case, on the
basis of what the police told me was there anything
else, no, just entirely what the police said, well
then, I don't want to hear about it because obviously
if it is based on what the police told me it couldn't
even do the police any harm.

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So, is there anything else then we
want to discuss?

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MR. PERCIVAL: I was hoping we
were going to have coffee.

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THE COMMISSIONER: Yes, I think we
will have coffee, unless somebody else has anything
else they want to raise in the absence of the press.

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MR. TOBIAS: My only concern,
Mr. Commissioner, is the apparent lack of the general
principle. I mean, first of all,

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what I'm about to say now may be rendered
entirely irrelevant by what the Divisional Court
does but once we get the police report, if indeed
we do get it if there is that wide distribution,
then do I understand that we have these kinds of

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2 discussions with respect to every witness and every
3 statement that was made?

4 THE COMMISSIONER: No, I don't think
5 so. These are the rules. First of all, no hearsay
6 unless the hearsay would be admissible under other
7 silence; secondly, I don't want any suspicion or
8 hunches that aren't based upon anything and I think
9 the way, the manner to do it is to find out the
10 basis for the opinion and if the basis for the
11 opinion is clearly valueless then we just don't
12 want to have it. If the basis is that it is upon
13 something I saw, what did you see, I saw so and so
14 with a smoking gun, well then, that's a pretty good
15 reason for suspecting that something is improper.
16 But it may be that it will get so delicate that we
17 will have to retire somewhere. It is going to be
18 difficult, it is going to be difficult. This is my
19 point. Remember, I don't want this thing to turn
20 into a witch hunt against Trayner, Nelles or any
21 of the others; at the same time I don't want it to
22 be a witch hunt against the police by keeping out
23 all of the evidence that might be of value to the
24 police, so, we are going to have some trouble.

25 At any rate, you have now seen,
26 there is another statement that you've got your



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4 hands on, so, you know what most of them are like.

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4 Who knows, they may all end up in your hands.

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MS. CRONK: Excuse me, sir, just before we break on this issue, lest it be misunderstood, I am most aware that this is a delicate matter and we will abide by the guidelines that have been given but I do under the circumstances think and would request that it be appropriate to direct that no counsel discuss this matter with Ms. Costello prior to this part of her evidence this afternoon.

THE COMMISSIONER: I was sort of hoping that you would sort of discuss it with Ms. Costello to find out what the basis is and if you find by discussing it with her that there really is none then the issue will not arise, but I'm going to ask the question. Isn't that it?

MS. CRONK: Well, sir, I understand and recognize the value in that and recognize as well that I have had two discussions with Ms. Costello on this already. It will obviously be of benefit when we come to this particular area that she listen to the question most carefully and answer only the question posed. But with respect to the matters discussed here this morning and the



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possible theories advanced as a basis for her opinion,
that should not in my opinion be discussed with her
before she is asked to give this evidence this
afternoon.

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THE COMMISSIONER: Yes, all right.

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MS. SYMES: Mr. Commissioner, I
take great exception to that. This is my client
and I would like to speak to her and I am entitled
as an officer of the Court to use my discretion.

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THE COMMISSIONER: All right, all
right. It is only that this is a Commission that
you are allowed to speak to your client at all, at
this point you would not under any circumstances.
So, if you are taking great resentment, please don't,
that's all, because nobody is saying anything.

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What has been happening here is
of course totally uncontrollable to try and police
this like a trial; but in any event it isn't a
trial. The only thing is that it is pretty obvious
to me that when somebody is backing down from a
statement that something has happened and I probably
give it as - I give the evidence generally a great
deal less weight.

What is your concern about Ms. Symes
speaking to her client?



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MS. CRONK: Please understand, sir, that it wasn't directed to Ms. Symes only. Our practice has been to introduce a relaxation of the normal rules and any counsel can talk to any witness at any stage during cross-examination.

MR. SOPINKA: Well, I submit that Ms. Symes should be present as well. If Ms. Cronk doesn't want Ms. Symes there then I am a little concerned because I think they should both be there.

MS. CRONK: Well, I wasn't proposing to talk with her about it either.

THE COMMISSIONER: I'm not going to make a ruling, it's too late now at this point about counsel speaking to witnesses. I just ask you all to realize what we are trying to do. We are trying to find out if there is a legitimate basis for what she is saying and if there is one I naturally do not expect you to discourage her from saying that, I expect you to say, well, that is exactly the sort of thing the Commission wants to know, if you have that legitimate basis and if there isn't a legitimate basis then we don't want to hear it.

Yes, Mr. Hunt.

MR. HUNT: Well, I want to support Ms. Cronk's application. The reason is this, and



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I'm not directing Ms. Symes, but we had an incident
before Christmas with Nurse Brown and we had to
go through her statement with her in some detail
and I reread it this morning and there is no question
that she was trying to back down from things that
she told the police and it wasn't until she was
pressed and pressed hard that she admitted that she
said it to the police and she admitted it. But
that is not my point. My point is this, and I am
not suggesting that this is Ms. Symes but it may
be that the nurses have amongst themselves decided
that things they said to the police they don't
want to live with and they may be taking things
from what counsel says that aren't intended by
counsel ---

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THE COMMISSIONER: That may well be
and in some occasions there seems to be a touch of
that. But as I have said before, if the witness
is going to lie, if the witness is going to withdraw
from some of the statements that have been made to
the police we can't do a thing for her and we can't
help her but cross-examine her on did you say this, did you
not say this and if she says, well, I said that but
I lied, and I am telling the truth now then we will
just have to deal with it.



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2 can talk to her over the noon break. So, if you
3 are bearing that in mind about taking your coffee
4 break.

5 THE COMMISSIONER: All right. All
6 right now, let's go down and at a quarter to 12:00
7 we will start into the hearing.

8 MS. CRONK: Thank you, sir.

9 ----Whereupon the In-Camera hearing adjourns.

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